In the Supreme Court of the United States

October Term, 1954

No. 277

FIREMAN'S FUND INDEMNITY CO., *Petitioner*

v.

UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Florida, Pensacola Division (R. 51-61), is reported at 110 F. Supp. 937. The opinion of the United States Court of Appeals for the Fifth Circuit (R. 279-87) is reported at 211 F. 2d 773.

JURISDICTION

The judgment of the Court of Appeals was entered on March 31, 1954. (R. 288). A petition

for rehearing, filed on May 6, 1954 (R. 292), was summarily denied on May 14, 1954 (R. 300).[1] The petition for certiorari, which was filed on August 11, 1954, invokes the jurisdiction of this Court under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether there was sufficient evidence in the record to support the district court's findings that respondent's vessel was seaworthy but that respondent was negligent.[2]

2. Whether an insurer, as subrogee to the claim of the insured against a third person, is barred by the insured's negligence and contractual promise to indemnify that person.

STATUTES AND CONTRACT PROVISIONS INVOLVED

Sections 4 and 33 of the Longshoremen's and Harbor Workers' Compensation Act,[3] as amended, are set forth in the Appendix, *infra*, pp. 13-16.

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[1] The petition for rehearing was not filed within the 21-day period fixed by Rule 29 of the Rules of the court of appeals, but was presented by special leave of Circuit Judge Strum granted pursuant to a motion likewise filed after the 21 days had expired (R. 289-291).

[2] The district court also found that petitioner's subrogor was contributorily negligent, but that finding was not challenged by petitioner in the court below or in the petition. The propriety of that finding is therefore not in issue in this Court.

[3] Sec. 4, 44 Stat. 1426, 33 U.S.C. 904; Sec. 33, 44 Stat. 1440, as amended, 52 Stat. 1168, 33 U.S.C. 933.

The relevant provisions of the contract between respondent and petitioner's subrogor are also included in the Appendix, *infra*, p. 17.

STATEMENT

On September 1, 1948, the USS *Okaloosa*, a naval transport, docked at Pensacola, Florida, for unloading. In order to expedite unloading, and in accordance with common naval procedure, an officer at the Pensacola Naval Air Station made verbal arrangements with Rosasco Brothers, a commercial stevedore, to discharge the cargo (R. 22). The verbal agreement of September 1 was formalized in writing on September 3 in a contract stated to be effective September 1, 1948. Crew-members of the *Okaloosa* began to discharge the cargo immediately and continued to do so until relieved by the commercial stevedore.

Longshoremen employed by the L. P. Schambeau Stevedoring Company, subcontractors for Rosasco, began unloading the *Okaloosa* at 4:00 P.M. After approximately one hours's work, they had removed all the cargo from the upper portion of hold #4 and uncovered the hatch covers to the lower part of the hold. None of the ship's crew was present from the time the stevedore began to unload, but before leaving the hold the boatswain in charge of the ship's unloading crew instructed the stevedore's people how to raise and safely secure the hatch covers (R. 239-40). The covers are hinged near the center of the ship; when raised they stand back-to-back about five feet

apart. On this occasion the hatch covers were raised by a steel cable from a deck winch and secured in place by hooks or "L" shaped metal latches attached to the bulkheads.[4]

The original design of the ship called for toggle pins to be suspended by a chain from the bulkhead for insertion into the metal latches and the bulkhead in order to prevent the latch from being jarred loose so as to release the hatch cover. Because these toggle pins had repeatedly been torn loose by the hoists of cargo in past operations, they were not replaced and were not available on the date of the accident. All this had been explained to personnel of the stevedoring subcontractor, and alternative means of securing the covers were described to them (R. 236, 256.)[5]

There were at least three other means of securing the hatch covers which provided protection equal to that afforded by the originally designed hooks and toggle pins, if not better: (1) An adequate supply of stove bolts and nuts, which were superior substitutes for the original toggle pins, were laid out on the deck of upper #4 hold (R. 237). (2) The steel lifting straps attached to the tops of the two hatch covers could be lashed to-

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[4] A diagram of a hatch cover and one means of securing it in an open position can be found in the Record, p. 39.

[5] There is some conflict in the testimony as to what description of alternative means of securing the covers was given the stevedore people. The record citations here are to the testimony which the lower courts apparently considered most reliable.

gether so as to prevent either cover from falling (R. 208, 238). (3) If necessary, the steel cables used to lift the covers could have been left attached to the covers, thus preventing an accidental closing. Although the stevedore was highly experienced, the foreman having had more than twenty years experience in such work, the stevedoring personnel took none of the three alternative precautions available to secure the hatch covers. The district court specifically found that the stevedore foreman should have known and did in fact know the danger presented by the insufficiently secured hatch covers (R. 58).

With the hatch covers secured open in this precarious fashion, the longshoremen proceeded to unload the lower part of #4 hold. At 5:35 P.M., when the unloading operations were within the exclusive control of the commercial stevedore, a wooden "pallet" fell out of an empty cargo sling which was being lowered into the hold. It struck one of the raised hatch covers causing it to be dislodged and to fall on three longshoremen working in the lower part of #4 hold. One of them was killed, and the other two were badly injured.

The petitioner, as workmen's compensation insurance carrier for Rosasco, paid to the injured longshoremen and the beneficiaries of the deceased man the amounts due them under the Longshoremen's and Harbor Workers Compensation Act. Then, as subrogee of Rosasco, petitioner brought this suit against the United States.

After consideration of all the evidence, the district court found that the *Okaloosa* was seaworthy but that the personnel of that vessel were negligent. Petitioner was barred from recovery, however, by the negligence of its subrogor, Rosasco Brothers. Moreover, the court construed the contract between Rosasco and the United States to include a promise by Rosasco to indemnify the United States against liability arising, in whole or in part, out of the negligence of Rosasco; this was a second bar to petitioner's recovery. The Court of Appeals for the Fifth Circuit, on appeal by petitioner, affirmed the district court's decree. The appellate court concurred in the finding that the *Okaloosa* was seaworthy but did not find sufficient evidence to support the conclusion that naval personnel had been negligent. Thus, having determined that there was no basis for liability by the United States, the Court of Appeals had no need to examine the two bars to recovery relied on by the district court.

ARGUMENT

1. To establish a basis for recovery from the United States, petitioner must show that the United States was absolutely liable for the injuries to the longshoremen, as the owner of an unseaworthy vesel, or that naval personnel were guilty of negligent conduct which caused the accident. The district court concluded that petitioner had failed to show the former basis of liability; the

court below, upon a review of the evidence, determined that petitioner had not sustained its burden of proving either ground.

a. The petition requests this Court to overturn the concurrent findings of both courts below that the *Okaloosa* was seaworthy. It is well established that an issue of fact, such as the seaworthy nature of a vessel, will not be re-examined by this Court after it has been twice considered below with consistent results. *Luckenbach* v. *McCahan Sugar Co.*, 248 U.S. 139; cf. *Just* v. *Chambers*, 312 U.S. 383. Moreover, if this Court should decide to make a third examination of the testimony relevant to the issue of seaworthiness, deference ought to be given to the findings of the trial judge who had opportunity to observe the witnesses.[6] In the present case the rulings below seem well supported. Three means of safely securing the hatch covers in an open position were readily available. Petitioner is reduced to the argument that the absence of a fourth method made the ship unseaworthy. This is not a case in which faulty equipment was accidently used when safe alternative equipment could have been used. *E.g.*, *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96. Rather this was an instance in which available safeguards were ignored by employees of an experienced stevedore with knowledge of the danger presented

[6] For a compilation of over 120 decisions by federal courts of appeals applying this principle in admiralty cases, see *Annotation*, 103 A.L.R. 775, 791-93.

by the patent absence of the designed means of securing the covers.[7] Except for the substitution by the ship's people of stove bolts for the toggle pins of the original design,[8] the petition suggests no reason for overturning the decisions below as to seaworthiness.

b. A second determination of fact to which the petition objects is the conclusion of the court below absolving the United States from negligence. The record contains little evidence to support a conclusion of negligence by the naval personnel; the district court found such negligence solely on the ground that the naval personnel did not make the replacement stove bolts available to the stevedore before leaving (R. 57). However, the uncontradicted testimony of the boatswain in charge points out that the bolts were then covered by cargo remaining in upper #4 hold (R. 236). The ship's crew exercised all due care by describing the methods of securing the covers (R. 208, 238) and making themselves available should any question arise (R. 215-16).

The petition does not squarely deny the correctness of the ruling on this issue by the court

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[7] At the time the hatch covers were raised one longshoreman objected, "I don't believe this here is going to hold, it looks mighty slack, this looks mighty bad to me." (R. 117). (R. 117).

[8] On the basis of uncontradicted testimony (R. 205, 229), the Court of Appeals concluded that use of the bolts would have provided greater safety than the originally designed toggle pins (Pet. 23).

below; instead it challenges that court's right to consider such a question. It is petitioner's stand that the failure by the United States to cross-assign error in the court of appeals forecloses the Government's rights and precludes examination by that court of this question. Although in general an appellate court in admiralty will not review findings without an assignment of error, an appeal is a trial *de novo* and the court clearly retains the power to do so.[9] See 4 Benedict, *Admiralty* (6th ed.), §§ 564, 572. In the instant case the court below reviewed the finding of negligence as well as the finding of seaworthiness, assigned as error by petitioner, since substantially the same evidence was involved. Indeed, it would be difficult to reconcile a limitation of the appellate court's power to review here with the general power in admiralty to try issues *de novo*. See Supreme Court Admiralty Rule 45; Rules of the Court of Appeals for the Fifth Circuit, Rule 12.

2. Even if the United States were responsible for injury to the longshoremen on the ground of unseaworthiness or negligence, this plaintiff could

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[9] The 1938 Rules of the Court of Appeals for the Second Circuit, for example, make specific reference to this power. See Rule 10. The cases cited by petitioner (Pet. 13, fn. 16) refer to the general refusal by appellate courts to change the decree of the district court in favor of a party without an appeal by that party. They are therefore inappropriate where, as here, the court considered unassigned error as an alternative ground for affirmance. See *Morley Co.* v. *Maryland Casualty Co.*, 300 U.S. 185, 191.

not recover. As the district court found (R. 57-61), petitioner is barred by the negligence and by the indemnity contract of its subrogor.

a. Petitioner's rights are those of a subrogee under the provisions of the Longshoremen's and Harbor Worker's Compensation Act. Sec. 33(i), *infra*, p. 16. Since it is generally agreed that a subrogee has no rights greater than his subrogor, petitioner is barred by any defenses which the United States would have had in a suit by the subrogor (Rosasco). Cf. *United States* v. *Munsey Trust Co.*, 332 U.S. 234. Nor is there any reason to believe that a different rule governs the rights of a subrogee under this Act. Therefore, the unchallenged finding of the district court that Rosasco was precluded from suit by its own negligence would prevent recovery by Rosasco's insurer. Indeed, neither Rosasco nor petitioner could obtain contribution even though the negligence of Rosasco was slight. *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U.S. 282.

But the petition argues that petitioner is also suing on behalf of the injured employees whose rights should not be impaired by defects in the rights of Rosasco. This contention ignores the clear language of the statute:[10] "the insurance carrier shall be subrogated to all the rights of the *employer* under this section" [emphasis added]. The fact that under the Act the employer, Ro-

[10] Sec. 33(i), 44 Stat. 1440, as amended, 52 Stat. 1168, 33 U.S.C. 933(i), *infra*, p. 16.

sasco, has the power to sue on behalf of his injured employees does not mean that his suit is exempt from all personal defenses. In *United States* v. *Munsey Trust Co., supra,* this Court expressly rejected the argument that an employer, as stakeholder of his employee's rights, can recover without regard to his ability to prevail alone.[11]

b. Rosasco, and therefore petitioner as well, was further prevented from recovery by its contract to indemnify the United States.[12] The district court found that the agreement as "clarified and/or modified" included a promise by Rosasco to indemnify the United States for liability arising, in whole or in part, out of the negligence of the stevedore. Petitioner does not point to evidence contradicting that construction or suggest any reason why the district court was in error.[13]

3. The case of *United States* v. *Arrow Stevedoring Co.*[14] is said by petitioner to represent a conflict with the decision below requiring review

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[11] Should certiorari be granted, this Court could not finally dispose of this case since the contributory negligence of the injured longshoremen which was placed in issue (R. 17), would then have to be tried in the district court.

[12] This case differs from *American Stevedores* v. *Porello,* 330 U.S. 446, where this Court remanded to the district court to take evidence as to the meaning of an ambiguous contract for indemnity. Such evidence has already been heard in the present case, and all ambiguity has been resolved.

[13] The ruling of the trial court should be given special weight in such matters. See fn. 6, *supra,* p. 7.

[14] 175 F. 2d 329 (C.A. 9), certiorari denied, 338 U.S. 904.

by this Court. The Ninth Circuit decision in that case upheld the right of a shipowner to indemnity against a negligent stevedore contractor in accordance with the similar clause of their contractual agreement. To that extent the *Arrow Stevedoring* case supports the ruling below. Moreover the court there, as here, reversed a district court finding of negligence by the navy personnel in a very similar fact situation. The petition argues, however, that the two decisions conflict in their rulings as to seaworthiness. But the unseaworthiness of the vessel created by the stevedore in the Ninth Circuit case was not contested or litigated, and even if it had been litigated, the conflict would be no more than a difference in findings of fact on somewhat different evidence.[15]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

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SEPTEMBER 1954.

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[15] In the *Arrow Stevedoring* case, for example, there is no express finding of alternative means of securing the covers.

APPENDIX

The Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, provides in part as follows:

Section 4 [44 Stat. 1426, 33 U.S.C. 904] Liability for compensation.

> (a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 7, 8, and 9. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.
>
> (b) Compensation shall be payable irrespective of fault as a cause for the injury.

Section 33 [44 Stat. 1440, as amended, 52 Stat. 1168, 33 U.S.C. 933] Compensation for injuries where third persons are liable.

> (a) If on account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the Secretary may provide, to receive such compensa-

tion or to recover damages against such third person.

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person.

(c) The payment of such compensation into the fund established in section 44 shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person, whether or not the representative has notified the deputy commissioner of his election.

(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner);

(B) the cost of all benefits actually furnished by him to the employee under section 7;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 7, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative.

(f) If the person entitled to compensation or the representative elects to recover damages against such third person and notifies the Secretary of his election and institutes

proceedings within the period prescribed in section 13, the employer shall be required to pay as compensation under this Act a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.

(g) If a compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this Act, the employer shall be liable for compensation as determined in subdivision (e) only if such compromise is made with his written approval.

(h) The deputy commissioner may, if the person entitled to compensation under this Act is a minor, make any election required under subdivision (a) of this section, or may authorize the parent or guardian of the minor to make such election.

(i) Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.

Contract Navy Department No. N204s-27661 between the United States Navy and Rosasco Brothers, plaintiff's subrogor, includes this provision (R. 23):

> As old age benefits, workmen's compensation, state's unemployment benefits, and public liability insurance rates are included in the hourly rate specified herein, all liability for damage or injury to persons or property resulting from the performance of this contract is assumed by the contractor.

This language was subsequently "clarified and/or modified" in a letter written by Commander J. W. Bottoms, U. S. Navy Supply and Fiscal Department (R. 34):

> * * * this letter is being directed to you as a clarification and/or modification of the written contract, and we hereby agree with you that your obligation in this regard is by your contract limited to pay all old age benefits and unemployment benefits on your employees, maintain workmen's compensation insurance on your employees, and carry contractor's public liability insurance to cover damage to Government property, or injury or damage to third persons caused by your negligence, or that of your employees, and not otherwise.

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